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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PHILIP CARDILLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a criminal defendant personally waive his right to be present at any stage of his trial for the waiver to be valid, and is it plain error for the trial to proceed in his involuntary absence during closing arguments and instructions to the jury?

2. Is the uncorroborated admission by the defendant of an element of 21 U.S.C. § 848, standing alone, insufficient as a matter of law to establish that element?

3. Is it a violation of a defendant's right to due process, compulsory process, and confrontation of adverse witnesses to deny a defendant the right to present evidence concerning the reliability and voluntariness of an uncorroborated admission, both before and during the trial?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, *United States v. Harris*, is reported at 908 F.2d 728. (Appendix 1). Only defendant Philip Cardilli is concerned with this petition.

JURISDICTION

On August 8, 1990, a panel of the United States Court of Appeals for the Eleventh Circuit affirmed the judgment

of the District Court. A petition for rehearing was denied on November 13, 1990. (Appendix 2). The Court granted Petitioner to and including April 1, 1991 in which to file this petition. (Appendix 3).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be compelled in any criminal case to be a witness against himself nor be deprived of liberty . . . without due process of law. . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor. . . .

STATUTORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 43:

> (a) Presence Required. The Defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial involving the impaneling of the jury and return of the verdict. . . .
>
> (b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> > (1) is voluntarily absent after the trial has commenced. . . .

Title 21, United States Code, Section 848:

Continuing Criminal Enterprise defined:

(d) For the purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter, the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

STATEMENT

Petitioner, Philip Cardilli, was convicted in the United States District Court for the Southern District of Florida on several drug-related counts, the most severe of which found that he engaged in a continuing criminal enterprise in violation of 21 U.S.C. § 848. The indictment under which he was charged named thirty persons (with only six persons tried); it described multiple operations in which narcotics were imported from Columbia by air and water. Petitioner's alleged role concerned the small boats that picked up bundles of drugs from waters near the Bahamas and brought them into the United States.

To convict under 21 U.S.C. § 848, the Government must prove, *inter alia*, that the defendant supervised five or more people. Prior to trial, the Government stated it intended to prove this element through a videotape made by a paid United States Custom Service informant, Cary Cole, in his hotel room. This tape was the only one used at trial although many covert audio and video tapes had been made. The Government, in its final summation on the continuing criminal enterprise charge, asked the jurors what they thought Petitioner meant when he said "I have to cut it down by a fifth" (Record 2783-84), although the defense questioned whether these words were the words said and also the interpretation the Government was giving them.[1] For there was nothing on the tape that connected the statements to the alleged organization or to any of the predicate violations with which Petitioner was charged. The prosecutor argued that this tape contained an admission that Petitioner had reduced his crew and proved that he supervised five or more persons.

Petitioner had objected to the use of the tape on the grounds that it was inaudible and unreliable. In making his offer of proof, Petitioner provided transcripts of the tape from five different sources, including three certified court reporters. (Record 1784) The trial court reviewed the transcripts, found that each was "significantly differ-

[1] Until this petition for certiorari, everyone has construed the prosecutor's quotation of Petitioner's alleged words on the tape as "I cut it down *to* a fifth." The difference is obvious: cutting it down *by* a fifth means reducing by 20 percent; whereas cutting it down *to* a fifth means reducing by 80 percent. The former statement—of cutting the crew *by* a fifth—cannot establish that there were at least five members of the crew. Petitioner most likely would count himself as one of the members of the crew. That would leave only four persons that Petitioner could manage.

ent" from the others, and refused to allow them to be used or introduced as evidence. However, it did allow the Government to play the videotape for the jury.

Cole was on the Government's pretrial list of witnesses. When he was not called during the Government case in chief, Petitioner attempted to subpoena him. The defense wanted to challenge the reliability and accuracy of the videotape, the relationship of the statements on the tape to the charged offenses, and the circumstances surrounding the voluntariness of Petitioner's statements on the tape. (Petitioner had been in an automobile accident shortly before and spoke with the slurred speech of intoxication.) However, the court refused to issue a subpoena for Cole.

The court also refused to allow testimony by five law enforcement officers (a United States Customs Agent, a Louisiana County Sheriff, and three Louisiana State Police officers) to challenge Cole's credibility and statements on the videotape. During an offer of proof outside the presence of the jury, these officers reported their prior dealings with informant Cole, saying he was "untruthful," "untrustworthy," "unreliable," "unbelievable," "uncredible," "unreputable," and "dishonest" (Record 2223-2273), and had attempted to falsely "set up" other people. The court ruled that Petitioner could not present the officers' testimony because Cole had not testified at trial.

Petitioner was in custody at the time of trial. During final summations, he left the courtroom in extreme pain and was rushed to the hospital by United States Marshals. Although he believed he suffered a burst appendix, subsequent hospital tests concluded he suffered a severe kidney stone attack. The trial continued in Petitioner's absence. Petitioner was not present for closing arguments of co-defendants, the Government rebuttal sum-

mation, ~~or the charge~~ to the jury. The jury retired without receiving any information about Petitioner's absence.

Petitioner appealed his conviction to the United States Court of Appeals of the Eleventh Circuit. Judge Hatchett wrote the court's opinion, with Judges Anderson and Dyer concurring concerning the three issues raised in this petition. *United States v. Harris*, 908 F.2d 728 (11th Cir. 1990).

First, the court of appeals found that Petitioner had waived any prejudice resulting from his absence by failing to object to proceeding with the trial in his absence. *Id.*, at 739. In support of this implicit waiver by counsel, the court cited *United States v. Jones*, 527 F.2d 817, 830 (D.C. Cir. 1975). In *Jones*, the defendant, who was not in custody, had returned late from lunch and his co-defendant voluntarily absented himself from the remainder of the trial. It found that any prejudice from his absence was overcome by the judge's instruction to the jury that co-defendant's absence should have no bearing on the case. In contrast, in the instant case, Petitioner was both in custody and involuntarily absent *and* the trial judge gave no explanation to the jury of why he was absent.

The court of appeals in the instant case, at 739, also found that Petitioner's "absence during co-defendant's summation, the prosecutor's rebuttal summation, and the court's charge to the jury" was "not significant." In other words, if it was error, it constituted harmless error. In support of this statement it cited *Finney v. Zant*, 709 F.2d 643, 646 (11th Cir. 1983), where the court found that any error by reason of defendant's absence during trial was "harmless beyond a reasonable doubt."

Second, the court of appeals agreed with Petitioner, at 736, that the *testimony* at Petitioner's trial could establish

that he had "managed" no more than three persons. It ruled, however, that the jury could base its finding that Petitioner "managed" five or more persons—as it was required to find to convict him of violating 21 U.S.C. § 848—on the videotaped conversation in which Petitioner stated that he had reduced his crew down to a fifth of what it had been. According to the court, the jury had a right to believe this admission by Petitioner and to base its finding of this element of § 848 on it.

Third, the court of appeals, at 737-38, upheld the trial judge's refusal either to subpoena the informant Cole or to allow his credibility to be impeached or to allow the proffered testimony of five police officers about Cole's unreliability. The court ruled that, because the government had not called Cole as a witness and had not relied on anything he had said in the videotape, the district court properly exercised its broad discretion by not admitting this evidence.

REASONS FOR GRANTING THE WRIT

All three questions of which Petitioner seeks review concern the rights of a criminal defendant and the scope of these rights. The Sixth Amendment right of a defendant "to a speedy and public trial, by an impartial jury . . . [and] to be confronted with the witnesses against him" implicates his right to be present at all phases of the trial. This right is codified in Rule 43, Federal Rules of Criminal Procedure. *In Question 1*, the Court will have to resolve conflicts that exist among the circuit courts of appeals. Is the right of a defendant to be present at every phase of the trial an indefeasible right, unless the defendant himself makes a voluntary and knowing waiver of this right? Or, can defense counsel waive this right for

his client by his failure to object to the continuation of the trial in the absence of the defendant? Or, notwithstanding the powerlessness of counsel to waive this right for his client, is this right subject to the harmless error doctrine? In other words, must the defendant show that he has been prejudiced before he can obtain a new trial for its violation?

In Question 2, the right of the defendant that is protected is to have his guilt determined beyond a reasonable doubt. Such a right implicates the requirement that there must be independent corroboration of any confession or admission of a defendant; otherwise, there is insufficient evidence as a matter of law. The decision of the court of appeals in the instant case, however, failed to observe this rule. Instead, it found that the uncorroborated admission of Petitioner on the videotape that he had reduced his drug crew to one-fifth of what it had been—though uncorroborated by any other evidence—was a sufficient basis for the jury's finding that Petitioner had directed at least five persons.[2]

We are asking the United States to confess error here. The opinion in the court below acknowledges that Petitioner's admission on the tape is uncorroborated. As we shall show below, it is black-letter law that, when there was only an uncorroborated admission, there was insufficient evidence to convict Petitioner under § 848. If the United States does not confess error on this question, this

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[2] Indeed, the words of the prosecutor's quotation that the crew had been reduced by a fifth makes, as noted above, this statement itself insufficient to establish that Petitioner "managed" at least five persons. This underscores the reason why the United States should confess error.

Court should grant the writ on this question and reverse Petitioner's conviction under § 848.

Question 3 concerns Fifth and Sixth Amendment rights, respectively, of a criminal defendant—of due process and of "be[ing] confronted with the witnesses against him; [of] . . . hav[ing] . . . compulsory process for obtaining witnesses in his favor." This Court should grant the writ to rule that Petitioner is entitled to a new trial because of the unconstitutional limitations that the district court placed on his ability to introduce evidence about the accuracy and significance of the videotape used against him. The Court should grant the writ to provide direction to district courts—that defendants will be granted new trials when the district court limits relevant evidence without a basis for such an exclusion in the Rules of Evidence.

Question 1

THE DEFENDANT'S RIGHT TO BE PRESENT AT TRIAL

As a result of his severe pain, Petitioner was involuntarily absent from a full day of trial, which included the summations of counsel, rebuttal by the prosecutor, final jury instructions, and the beginning of jury deliberations. As noted above, the court of appeals supported its holding that counsel's failure to object[3] to Petitioner's absence

[3] The D.C. Circuit has repeatedly held that even an expressed waiver of an in-custody defendant's presence by counsel is without effect. *United States v. Gordon*, 829 F.2d 119, 125 (D.C. Cir. 1987); *Wade v. United States*, 441 F.2d 1046, 1050 (D.C. Cir. 1971); *Cross v. United States*, 325 F.2d 629, 632 n.8 (D.C. Cir. 1963). *A fortiori*, a waiver by silence—by failing to object—is without effect. *Diaz v. United States*, 223 U.S. 442, 458-59 (1912); *United States v. Crutcher*, 405 F.2d 239, 243 (2d Cir.), cert. denied, 394 U.S. 908 (1968).

constituted a waiver of his presence by relying on *United States v. Jones*, 527 F.2d 817, 830 (D.C. Cir. 1975), which involved a defendant's failure to object to the *voluntary* absence of a *co-defendant*.

This holding of the court below conflicts with those cases from this Court and other circuit courts that distinguish between voluntary and involuntary absences,[4] and between defendants who are in custody and those who are not in custody. It adds to an area of uncertainty and confusion in the law among the lower courts. Moreover, it conflicts with those cases that hold that a waiver of presence must be knowing and voluntary, and made by the defendant rather than his attorney.[5]

There is, however, a split in the circuits concerning when the defendant's absence from a part of the trial constitutes harmless error. The Court should grant the writ to resolve this conflict.

1. The Statutory And Constitutional Right To Be Present

Rule 43(a), Federal Rules of Criminal Procedure, requires a defendant's presence at all stages of his criminal trial—from arraignment through the return of a verdict. This rule is a restatement of existing law, which holds that a defendant has a right to be present "where his presence has a relation to the fullness of his opportunity to defend against the charge." *Snyder v. Massachusetts*,

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[4] The decision below also conflicts with the plain language of Rule 43(b), which allows trial to proceed only in cases where the defendant's absence is *voluntary* and *intentional*.

[5] Compare *United States v. Gallo*, 763 F.2d 1504, 1529 (6th Cir. 1985), where the defendant voluntarily and on-the-record waived his presence after becoming ill.

291 U.S. 97, 105-06 (1932). In *Kentucky v. Stincer*, 482 U.S. 730 (1987), this Court recently reaffirmed that "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the proceeding." *Id.* at 745.

This Court has repeatedly held that this right is grounded in both the defendant's Sixth Amendment right of confrontation, *Illinois v. Allen*, 397 U.S. 337, 338 (1970), and the Fifth Amendment right to due process, *United States v. Gagnon*, 470 U.S. 522, 526-27 (1987) (per curiam). Although application of the confrontation right has generally been limited to cases involving a defendant's absence during the testimony of a witness, *Gagnon, supra*, at 526, lower courts have also applied it in instances where the defendant has not been able to "confront" the jury. *See, e.g., United States v. Fontanez*, 878 F.2d 33, 37 (2d Cir. 1989) (defendant's absence when court gave *Allen* charge); *Wade v. United States*, 441 F.2d 1046, 1050 (D.C. Cir. 1971) (same). The due process right, on the other hand, is intended to protect the fairness of the proceeding itself, both for the defendant, *United States v. Reiter*, 897 F.2d 639 (2d Cir. 1990) (absence from arraignment), and the public. *Bustamante v. Eyman*, 456 F.2d 269, 274 (9th Cir. 1972) (the public has a right to know that criminal trials are conducted fairly and according to the law).

2. All Courts Agree That The Right To Presence Can Be Waived In Some Instances

Federal Rule of Criminal Procedure 43(b) provides that a defendant is deemed to have waived his right of presence only if he (1) voluntarily absents himself after the trial has commenced, or (2) intentionally and persistently

disrupts the proceedings.[6] This rule is a codification of such cases as *Taylor v. United States*, 414 U.S. 17 (1973), where the defendant voluntarily absconded from his trial, and *Illinois v. Allen*, *supra*, where the defendant became obstreperous during his trial.

Contrary to times when a defendant's absence is voluntary, lower courts have consistently held that a defendant's involuntary absence, for whatever reason, does not constitute a waiver of his right to be present. *Fontanez*, 878 F.2d 33 (defendant involuntarily absent during *Allen* charge); *United States v. Hernandez*, 873 F.2d 516 (2d Cir. 1989) (defendant absent due to arrest on unrelated charge); *United States v. Gordon*, 829 F.2d 119 (D.C. Cir. 1987) (defendant kept in courtroom holding cell during impaneling of jury); *United States v. Alfano*, 664 F. Supp. 160 (S.D.N.Y. 1987) (defendant wounded and hospitalized).

In cases where a defendant is in custody, courts have been virtually unanimous[7] in their affirmation of the principle set forth in *Diaz*, 223 U.S. at 455, that no waiver can occur "because [the defendant's] presence or absence

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[6] Even when a defendant is voluntarily absent, a trial judge should not proceed without weighing three factors—*i.e.*, the likelihood that the trial could soon proceed with the defendant, the difficulty of delaying or rescheduling the trial, and the burden of having a second trial. *Fontanez*, 878 F.2d at 37; *United States v. Beltran-Nunez*, 716 F.2d 287, 290-91 (5th Cir. 1983). As the Court put it in *United States v. Tortora*, 464 F.2d 1202 (2d Cir.), cert. denied, 409 U.S. 1063 (1972), the court can proceed "only when the public interest clearly outweighs that of the voluntarily absent defendant." *Id.*

[7] *Larson v. Tansy*, 911 F.2d 392 (10th Cir. 1990); *United States v. Gregorio*, 497 F.2d 1253, 1257 n.3 (4th Cir.), cert. denied, 419 U.S. 1024 (1974); *Bustamante v. Eyman*, 456 F.2d at 273-74; *United States v. Crutcher*, 405 F.2d at 243; *Cross v. United States*, 325 F.2d 629, 631 (D.C. Cir. 1963); *Evans v. United States*, 284 F.2d 393, 395 (6th Cir. 1960).

is not within his control." *Fontanez*, 878 F.2d at 36. In *Gordon*, 829 F.2d at 125 n.7, the court, following the standard set forth in *Johnson v. Zerbst* held that a trial court can accept an in-custody defendant's waiver of presence only after advising him of that right and obtaining an on-the-record personal waiver in open court.

The common theme running through all of these cases is that a waiver, to be valid, must be a voluntary "relinquishment of a known right." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). When a defendant is involuntarily absent, however, he can neither be informed of his right to be present, *Cross*, 325 F.2d at 631, nor protect that right, *Diaz*, 223 U.S. at 459.

Courts have also indulged a presumption against waiver in cases where the defendant's counsel either specifically waived the defendant's presence, *Larson v. Tansy*, 911 F.2d 392, 396 (10th Cir. 1990), or by silence acquiesced in his absence, *Diaz*, 223 U.S. at 459. In *Taylor v. Illinois*, 484 U.S. 400 (1988), this Court noted that the "right to be present during trial," as with other "basic rights," cannot be waived by an attorney "without the fully informed and publicly acknowledged consent of the client." *Id.* at 417-18 and n.24. This principle has routinely been followed by the lower courts. *Gordon*, 829 F.2d at 125 (counsel's waiver of the defendant's presence insufficient); *Bustamante v. Eyman*, 456 F.2d at 274 (counsel's waiver is without effect); *Crutcher*, 405 F.2d at 243 (counsel's waiver is not binding on the defendant); *Cross*, 325 F.2d at 632 n.8 (stipulation by counsel is no substitute for an informed waiver by the defendant); *Evans*, 284 F.2d at 395 (counsel's waiver without the defendant's knowledge is ineffective). *A fortiori*, because Petitioner was in custody and his absence was not voluntary, the court's finding of waiver by counsel for Petitioner is an aberration.

3. The Conflict That Exists Among The Circuits Concerning When The Harmless Error Doctrine Can Be Invoked

a. In *Finney v. Zant*, 709 F.2d 643, 646 (11th Cir. 1983), the court found that the defendant had not shown that he was prejudiced by his brief absence from the trial because his attorneys were present at all times. In *United States v. Stratton*, 649 F.2d 1066, 1081 (5th Cir. 1983), the court granted the defendant a new trial because *both* he and counsel were absent at crucial stages of the trial, including the government's summation. Had his attorney been present, however, the court would have found that the defendant's absence constituted harmless error. *Id.*, at 1080. In many cases finding a defendant's involuntary absence at trial to have been harmless error, the court emphasizes the fact that while the defendant may have been absent, his attorney was present to protect his rights. *See, e.g., United States v. Walls*, 577 F.2d 690 (9th Cir. 1978), and *United States v. Toliver*, 541 F.2d 958 (2d Cir. 1976). "Where[, however,] there is any reasonable possibility of prejudice from the defendant's absence at any stage of the proceedings, a conviction cannot stand." *Estes v. United States*, 335 F.2d 609, 615 (5th Cir. 1964), cert. denied, 379 U.S. 964 (1965).

b. In contrast, in *Lewis v. United States*, 146 U.S. 370 (1892), this Court noted that the "necessities of the defense may not be met by the presence of counsel alone." *Id.* at 371. As the court put it in *Bustamante v. Eyman*, 456 F.2d at 274, "the presence of counsel is no substitute for the presence of the defendant himself. The right to be present at trial stems in part from the fact that by his physical presence the defendant can participate in the presentation of his rights." In short, a defendant who is present can both assist his attorney and exert a powerful " 'psychological effect on the jury.' " *Larson v. Tansy*, 911 F.2d at 396, quoting *Wade*, 441 F.2d at 1050.

In light of these important fundamental principles, courts of appeal that have considered the harmless error question in cases where a defendant is involuntarily absent have used a stricter standard than actual prejudice—namely, whether the defendant's absence "created any reasonable possibility of prejudice." *Larson v. Tansy*, 911 F.2d at 396; *Fontanez*, 878 F.2d at 37; *Gordon*, 829 F.2d at 1050. In applying this standard, most courts have refused to find harmless error. For example, in *Larson v. Tansy*, the defendant was absent from counsel's summations, the jury instructions and the return of the verdict; the Government argued that the presence of the defendant during those stages would not have made any difference and therefore that his absence was harmless. The Tenth Circuit, following several other circuits, disagreed. It held the following:

> Because we hold that defendant might have assisted his counsel and defendant's mere presence could have a psychological influence on the jury, we also hold that it was not harmless error to exclude defendant. There is a reasonable possibility of prejudice. . . .

Id. at 396. *See also, Alfano*, 664 F.Supp. at 162 (defendant's involuntary absence from summations, the prosecutor's rebuttal, and the court's jury charge required mistrial).

Some courts have held that jury instructions are a critical stage that require a defendant's presence at a criminal trial: *United States v. Fontanez*, 878 F.2d 33, 35 (2d Cir. 1989); *Bustamante v. Eyman*, 456 F.2d 269, 271 (9th Cir. 1972); *Evans v. United States*, 284 F.2d 393, 395 (6th Cir. 1960). Similarly, summations are a critical stage: *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1932); *Larson v. Tansy*, 911 F.2d 392, 394 (10th Cir. 1990); *United States v. Alfano*, 664 F. Supp. 160, 161 (S.D.N.Y. 1987).

c. In Petitioner's case, he was absent from the final summations. He continued to be absent throughout the prosecutor's rebuttal—when the prosecutor argued about Petitioner's admission on the videotape—and throughout the court's charge to the jury when the court explained the elements of the offenses charged against Petitioner. When the jury retired to deliberate, Petitioner was conspicuously absent, although he had been present for the bulk of the trial. The court, however, did not explain to the jury why Petitioner was not present.

Numerous courts have found that an absence without explanation allows "the jury [to] speculate[ ] adversely" about that absence. *Larson v. Tansy*, 911 F.2d at 396; *Gordon*, 829 F.2d at 128; *Wade*, 441 F.2d at 1050. In Petitioner's case, it is entirely possible, if not probable, that the jury speculated that Petitioner, being conscious of his guilt, suddenly absconded at the last minute. Such speculation would surely have been adverse to Petitioner. Moreover, and perhaps more important, is the fact that Petitioner, by being absent, was unable to assist his attorney during critical stages of his trial. He could not make suggestions, correct misstatements, or object to the summations, rebuttal and jury charge. *See Snyder v. Massachusetts*, 291 U.S. at 106 (if a defendant is present during summations, he can "give advice or suggestions or even supersede his lawyers altogether").

Question 2

THE UNCORROBORATED ADMISSION OF DEFENDANT

1. Petitioner was charged in Count 3 with engaging in a continuing criminal drug enterprise in violation of 21 U.S.C. § 848. That statute specifically requires the Government to prove, *inter alia*, that the charged defendant

supervised "five or more" persons. *Cf. United States v. Young*, 745 F.2d 733, 747 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985) (collecting cases). At trial, Petitioner argued that the Government failed to prove that element of the statute, and, on appeal, challenged that failure on insufficient evidence grounds. The Court of Appeals agreed with Petitioner that the Government had only proved that Petitioner supervised *three* people. 908 F.2d at 736. However, it upheld Petitioner's conviction, finding that the jury had a right to believe his uncorroborated admission to informant Cary Cole. *Id.*

2. Admissions by the accused "of essential facts or elements of the crime, subsequent to the crime, are of the same character as confessions," and, therefore, cannot form the basis for a criminal conviction without independent corroboration. *Opper v. United States*, 348 U.S. 84, 90 (1954). In *Smith v. United States*, 348 U.S. 147 (1954), this Court reaffirmed that confessions are inherently unreliable because they can be "coerced or induced," "involuntary," or "false." *Id.* at 153, citing *Warzower v. United States*, 312 U.S. 342, 347 (1941). As this Court stated in *Opper*, at 89-90, doubt about the reliability of a confession comes from a longstanding understanding of the "zeal of the agencies of prosecution to protect the peace, the self interest of the accomplice, the maliciousness of the enemy or the aberration or weakness of the accused under the strain of suspicion [to] tinge or warp the facts of the confession."

Because "admissions have the same possibilities for error as confessions [,t]hey, too, must be corroborated." *Id.* at 91. *Accord Wong Sun v. United States*, 371 U.S. 471, 489 (1963); *United States v. Calderon*, 348 U.S. 160, 168 (1954). As noted in *Opper*, the unreliability of an admission is aggravated by the fact that it is not made under

oath nor subject to cross-examination. Indeed, because an admission can easily be mere puffing or exaggerated boasting on the part of the accused, it is considered even weaker and more suspect evidence than a confession. Accordingly, the independent evidence corroborating the admission must (1) fortify the truth of the admission, (2) corroborate the element of the offense established by the admission alone, and (3) establish other elements of the offense not shown by the admission. *United States v. Abigando*, 439 F.2d 827, 833 (5th Cir. 1971), citing *Smith*, 348 U.S. at 156.

3. The facts of this case clearly demonstrate the wisdom of the independent corroboration rule. On the tape heard by the jury, Cole, over a two-hour period, asked Petitioner leading questions about many subjects. The quality of the tape was so poor, however, that five different transcribers could not agree on what Petitioner said on the tape and at least two court reporters refused to even attempt to transcribe the tape. What the video did capture, however, was an intoxicated Petitioner who slurred his speech and who was consoled and waited on by Cole.[8]

Almost a week after the inaudible two-hour tape was played to the jury, the prosecutor, during his final argument, plucked a single sentence from the tape and asked the jurors what they thought Petitioner meant when he

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[8] Just a few hours before the videotape was made, Petitioner had been involved in a severe automobile accident which totalled his car and clearly upset him. This is clear in the first few minutes of the tape where Petitioner telephoned his wife to tell her about the accident. Cole, hearing of the accident, expressed sympathy for Petitioner's loss and continually brought him coffee in an effort to console him.

said, "I have to cut it down by a fifth." That admission, the prosecutor argued, proved that Petitioner supervised five or more persons.

4. The Court of Appeals correctly found that the Government only presented independent proof that Petitioner was the supervisor of only three persons. However, it upheld the continuing criminal enterprise conviction on the basis of the prosecutor's interpretation of the admission by Petitioner on the videotape.[9] That decision conflicts with prior decisions of this Court and other federal courts, and is constitutionally unacceptable because it upholds a criminal conviction without proof of all the elements of the offense.

Question 3

THE EXCLUSION OF ALL EVIDENCE CHALLENGING DEFENDANT'S UNCORROBORATED ADMISSION

1. Petitioner's Attempts To Challenge His Admission

The Government, at trial, used Petitioner's videotaped admission that he had to cut his crew down by a fifth as substantive evidence of his guilt on the continuing criminal enterprise charge. As noted above, that admission constituted the only evidence on that element of the offense.

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[9] The statute, 21 U.S.C. § 848(d), requires that the supervisor supervise the five supervisees during the commission of the charged series of predicate acts. *See United States v. Bollinger*, 796 F.2d 1394, 1403 (11th Cir. 1986). The admission on the videotape, however, was not tied to any charged predicate act, nor particular supervisee, nor even any illegal activity. Rather, it was ambiguous and subject to interpretations other than that urged by the prosecutor.

Prior to trial, Petitioner objected to the introduction of the videotape on the ground that it was of such poor quality and so inaudible that its consideration by the jury would deny Petitioner due process. After reviewing five independent transcriptions of the tape, the trial court agreed that there was no way of determining which, if any, transcript was accurate. Therefore, it refused to allow the Government to use the transcript during trial. (Record 1915).

Petitioner put the Government on notice that if the videotape were introduced into evidence, he would call the informant who made the tape, Cole, to testify about the events leading up to the making of the tape, the circumstances surrounding Petitioner's statements in the tape, and Cole's statements on the tape.[10] The Government, although it did introduce the tape into evidence and play it for the jury (Record 1936), did not call Cole as a prosecution witness. Petitioner, therefore, repeatedly asked the Government to produce Cole for examination as a defense witness. (Record 2115). When the Government refused, Petitioner repeatedly moved the trial court to issue a subpoena for Cole's presence. (Record 2121; 2134). The court, however, refused to issue the subpoena (Record 2134) and Cole never appeared at the trial.

In order to challenge the credibility of Cole (who was one party to the videotaped conversation), to cast doubt

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[10] Prior to trial, Petitioner attempted to locate Cole. However, the Government refused to provide any information concerning Cole's whereabouts even though Cole's drivers license listed his address as the United States Attorneys office. (Record 510, 526). The Government did not assert any privilege for not producing Cole nor did it assert that he was "unavailable," as required by *Ohio v. Roberts*, 448 U.S. 56, 62-66 (1980).

on the reliability of the tape, and to challenge the testimony of the agent who introduced and testified about the tape, Petitioner subpoenaed five law enforcement officers who had previously worked with Cole in their official capacities. The Government made a motion in limine to prohibit the officers' testimony. (Record 2111). It argued that since Cole never "testified," Petitioner should not be allowed to present any evidence concerning Cole. (Record 2112).

2. The Voluntariness Of A Vital Admission Should Be Determined The Same As The Voluntariness Of A Confession

a. In *Opper v. United States*, 348 U.S. 84, 90-91 (1954), and *Smith v. United States*, 348 U.S. 147, 155 (1954), this Court reaffirmed that when the admission of an accused assumes vital importance in the presentation of the prosecution's case, it should be considered by the trial court the same as a confession. Although the holdings of these cases concerned the application of the independent corroboration rule to both confessions and admissions, their rationale of comparing confessions to admissions can and should be applied to all other aspects of such admissions.

b. In *Jackson v. Denno*, 378 U.S. 368 (1964), this Court held that a defendant has a "constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." *Id.* at 377. Such a hearing should be held "prior to" the submission of the confession to the jury, *Sims v. Georgia*, 385 U.S. 538, 539 (1967), and should examine "all of the attendant circumstances" surrounding

the admissibility of the confession.[11] *Haynes v. Washington*, 373 U.S. 503, 513 (1963). A confession which is "coerced" or the product of "physical or psychological pressure," is inadmissible. *Townsend v. Sain*, 372 U.S. 293, 307 (1963).[12]

c. The trial court in Petitioner's case not only failed to hold a hearing to determine the voluntariness and admissibility of Petitioner's "admission" to an investigative employee of the Government, it refused even to allow Petitioner to subpoena that employee for such a hearing. Had Petitioner been allowed such a hearing, "[i]t is possible" that Petitioner could have demonstrated that his admission was neither voluntary nor reliable. *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). For example, the video portion of the tape showed an intoxicated Petitioner (who had just been involved in a serious automobile accident) being consoled and waited on by a highly polished government informant. If, at such a hearing, the court determined that Petitioner's statements were induced, coerced, or unreliable, the tape would have been inadmissible.

3. Petitioner Was Entitled To Present Evidence To The Jury Relating To The Accuracy, Voluntariness, and Weight Of His Admission

a. Even if a judge determines out of the jury's presence that a confession is "freely and voluntarily given," *Sims v. Georgia*, 385 U.S. at 543-44, a defendant has a

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[11] This includes confessions made under the influence of drugs, *Townsend v. Sain*, 372 U.S. at 308, and through use of "sympathy falsely aroused." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

[12] Title 18 U.S.C. § 3501(a) has codified these requirements in federal cases.

"constitutional right to a fair opportunity to present [at trial] a defense" to the confession. *California v. Trombetta*, 467 U.S. 479, 485 (1984). In *Crane v. Kentucky*, 476 U.S. 683 (1986), this Court reaffirmed that "questions of credibility, whether of a witness or of a confession, are for the jury, and therefore, a defendant is entitled to challenge the reliability [of a confession] during the course of the trial." *Id.* at 688, citing, *Jackson*, 378 U.S. at 386. *Accord Lego v. Twomey*, 404 U.S. 477, 485-86 (1970) (a defendant is free "to familiarize a jury with circumstances that attend the taking of a confession, including facts bearing upon its weight and voluntariness"). The "circumstances surrounding a confession" can be "highly relevant to the ultimate factual issue of the defendant's guilt or innocence." *Crane v. Kentucky*, 476 U.S. at 689. A confession is "not conclusive of guilt [and] may be shown to be 'insufficiently corroborated or otherwise . . . unworthy of belief.' " *Id.*, quoting *Lego v. Twomey*, 404 U.S. at 485-86.

b. Any "blanket exclusion" of evidence challenging a confession or vital admission of the accused denies the defendant a fair trial. *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973). The due process clause of the Fifth Amendment and the compulsory process and confrontation clauses of the Sixth Amendment guarantee criminal defendants " 'a meaningful opportunity to present a complete defense.' " *Crane v. Kentucky*, 476 U.S. at 690, quoting *California v. Trombetta*, 467 U.S. at 485. At a minimum, this entitles a defendant to an opportunity to be heard. As this Court stated in *Crane*, "[t]hat opportunity would be an empty one if the States were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Id.*

c. The trial court in Petitioner's case refused to allow him to call informant Cole as a witness to shed light on the circumstances surrounding Petitioner's videotaped admission. Because Cole was the only person on that tape besides Petitioner, and Petitioner could not cross examine the tape, the trial court's actions denied Petitioner his constitutional rights to compulsory process and confrontation. *Cf. Lee v. Illinois*, 476 U.S. 530, 539-40 (1986) (the right to confront and cross examine the witness is primarily a functional right that promotes reliability in criminal trials); *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (compulsory process requires the Government to assist "in compelling the attendance of favorable witnesses at trial [and gives defendant] the right to put before a jury evidence that might influence the determination of guilt").

Petitioner was the only other party involved in the taped conversation. However, Petitioner did not testify at trial, nor could he be required to do so. Therefore, he had a constitutional right to call Cole as a witness in order to persuade the jury that what was said on the tape was not voluntary, credible, reliable, or connected to the charged offenses.

The trial court also refused to allow Petitioner to present the testimony of five law enforcement officers to challenge the reliability, truthfulness, credibility, and actions of informant Cole. This deprived Petitioner of his constitutional right to present a complete defense. *Cf. Rock v. Arkansas*, 483 U.S. 44 (1987).

In sum, Petitioner was denied his right to a fair trial—*i.e.*, the prosecution's case was not subjected to "meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). The lower court's decision conflicts not only with prior decisions of this and other courts, but

with fundamental rights guaranteed by the Fifth and Sixth Amendments. This Court should grant this petition in order to resolve this conflict, and address the important and recurring questions regarding a defendant's right to challenge a vital admission both before and during trial.

CONCLUSION

For the reasons given, the Court should grant the writ of certiorari we seek.

Respectfully submitted,

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April, 1991

APPENDIX

APPENDIX 1

[728] **908 F.2d 728 (11th Cir. 1990)**

UNITED STATES of America,
Plaintiff-Appellee,

v.

Albert HARRIS, a/k/a Bert, Lloyd Frink, Steve Bucchiere, Philip Cardilli, a/k/a Shaver, Jesus Haim, a/k/a Waterbucket, Alp Martin, Defendants-Appellants.

No. 88-6212.

United States Court of Appeals,
Eleventh Circuit.

Aug. 8, 1990.

Defendants were convicted in the United States District Court for the Southern District of Florida, No. 87-782-CR-JCP, James C. Paine, J., of various offenses arising from cocaine importation conspiracy, and they appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) juror's statements during trial did not suggest serious jury contamination that required trial court to interview each juror; (2) evidence was sufficient to support convictions except for conviction for importation of marijuana; (3) defendant was not entitled to severance; (4) coconspirator's statement was "in furtherance" of conspiracy and was admissible; (5) instruction on continuing criminal enterprise was proper; and (6) conspiracy to import narcotics conviction merged with continuing criminal enterprise conviction.

Affirmed in part, reversed in part, and vacated in part.

Anderson, Circuit Judge, filed an opinion concurring in part and dissenting in part.

* * * * *

[731] Marcia J. Silvers, Miami, Fla., for Harris.

Robert P. Foley, Foley and Colton, P.A., West Palm Beach, Fla., for Frink.

Leonard J. Cooperman, Miami, Fla., for Bucchiere.

S. Skip Taylor, Miami, Fla., Nathan Z. Dershowitz, Dershowitz & Eiger, P.C., New York City, for Cardilli.

Hilliard Moldof, Whitelock & Moldof, Ft. Lauderdale, Fla., for Haim.

Lori Barrist, Asst. Federal Public Defender, Miami, Fla., for Martin.

Michael E. Runowicz, Linda Collins Hertz, Lynne W. Lamprecht, Anne Ruth Schultz, Asst. U.S. Attys., Miami, Fla., for the U.S.

Appeal from the United States District Court for the Southern District of Florida.

Before HATCHETT and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

HATCHETT, Circuit Judge.

In this multiple count and multiple defendant drug importation case, we reverse the convictions on one appellant, but affirm on at least one count on the other appellants.

FACTS

In 1982, Philip Cardilli, along with co-conspirators James Coley, Michael Munday, Daniel Sims, Richard Bahmann, and Frank Bahmann, devised a plan to import cocaine into the United States. The conspiracy, known as the "Munday/Coley organization," between 1983 and 1986, successfully completed many importations of cocaine and marijuana. The plan called for Coley and Munday to fly a Piper Navajo to Stella Maris, in the Bahamas. Coley and Munday would dress in uniforms to resemble charter pilots and bring women including Joyce Coley, Lisa Cardilli, and Nancy Sims, to stay on the island as if on vaca-

tion to give a legitimate appearance to the trip. Coley and Munday then would fly the aircraft to Columbia and obtain a load of cocaine. Upon returning to the Bahamas, they usually dropped the drugs into the waters of Scrub Cay where Cardilli stowed them aboard small boats. A second plane, a scout, accompanied the boats either to Nassau or to the United States to detect law enforcement activities. Munday and Coley would then return to Stella Maris in the Navajo and fly the women back to the United States. The government presented evidence of at least nine successful importations of approximately 400 kilograms of cocaine per trip under this plan.

[732] In August, 1983, some members of the conspiracy assisted an unidentified man known as "Uncle Bill" in off-loading marijuana from a freighter in the Bahamas. Frank Bahmann flew a plane over the area to search for the freighter while Cardilli assisted in retrieving the bales of marijuana which were thrown out of the freighter. On the evening of the day when the drugs were off-loaded, Frank Bahmann saw Cardilli, Daniel Sims, Bill Cossin, a man named Vince, and Bucchiere enter the restaurant where Bahmann was having dinner with Nancy Sims. Bahmann testified that Cardilli, Sims, Cossin, Vince and Bucchiere were all "dirty, scratched up," and "disheveled." Danny Sims told Bahmann that they had unloaded the freighter and put the marijuana on an island. It took Cardilli three separate trips to bring the entire load to the United States.

In 1985, the conspiracy devised a new scheme which by-passed the Bahamas. Under the new scheme, drugs were flown directly to "the ranch," located near Lakeland, Florida. In Lakeland, the conspiracy employed several people, including Martin, to act as "lookouts," to warn co-conspirators not to land the plane if law enforcement

personnel were nearby. The conspiracy's activities ended in September of 1986 when law enforcement agents intercepted a plane after it landed at the Lakeland ranch.

PROCEDURAL HISTORY

A grand jury returned a twenty-eight count indictment against thirty co-defendants associated with the conspiracy. The counts included continuing criminal enterprise, 21 U.S.C. § 848, violation of the Travel Act, 18 U.S.C. § 371, conspiracy to import controlled substances, in violation of 21 U.S.C. § 963, and a variety of counts for the importation of cocaine and the importation of marijuana, in violation of 21 U.S.C. § 952(a). Eighteen defendants entered guilty pleas; six remained at large at the time of the appellants' trial; only the six appellants went to trial.

HARRIS

The jury convicted Harris for conspiracy to violate the Travel Act, conspiracy to import controlled substances, and two counts of importing cocaine, but acquitted Harris on one count of importing cocaine and one count of importing marijuana.

FRINK

The jury convicted Frink of conspiracy to import controlled substances and one count of importing cocaine, but acquitted Frink of conspiracy to violate the Travel Act.

BUCCHIERE

The district court granted Bucchiere's motion for judgment of acquittal on one count of importing cocaine. The jury convicted Bucchiere on one count of importing mari-

juana, and acquitted him on three other counts of importing marijuana.

CARDILLI

The jury convicted Cardilli of operating a continuing criminal enterprise, conspiracy to violate the Travel Act, conspiracy to import controlled substances, three counts of importing cocaine, and three counts of importing marijuana. The jury acquitted Cardilli on one count of importing marijuana.

HAIM

The jury convicted Haim of operating a continuing criminal enterprise, conspiracy to violate the Travel Act, and three counts of importing cocaine.

MARTIN

The district court granted Martin's motion for a judgment of acquittal on two counts of importing cocaine. The jury convicted Martin of continuing criminal enterprise, conspiracy to violate the Travel Act, and three counts of importing cocaine, but acquitted him of two other counts of importing cocaine.

JURY MATTERS

On the second day of trial, the court took testimony that during a lunch break, one [733] juror was overheard telling another juror that "these guys sitting across from us think they're going to get off on this." The defense asked that the two jurors be examined and also moved that either the two jurors be excused or that a mistrial be granted.

The court denied the motion and without repeating the comment, asked the jury as a group whether "any juror has made any kind of decision up to this point that he or she could not keep a completely open mind until all of the evidence is in, and until the case has been explained to you." No juror responded affirmatively and the trial continued.

One of the same jurors later was heard to say from the jury box "do it to him good" as a Drug Enforcement Agency agent was about to testify. The defense again moved that the juror be excused or that the court grant a mistrial. The district court denied the motion.

CONTENTIONS OF THE PARTIES

All appellants contend that the district court failed to adequately investigate the alleged incidents of juror misconduct, and that the evidence is insufficient to prove their guilt beyond a reasonable doubt. Martin contends that the district court erred in denying his motion for severance. Bucchiere and Harris contend that the district court erred in admitting the declarations of co-conspirators.

Cardilli raises the following contentions: (1) the district court improperly instructed the jury on the continuing criminal enterprise charge; (2) the district court erred in excluding impeachment testimony; (3) the district court improperly answered a jury question regarding Federal Bureau of Investigation reports; (4) the district court erred in denying his motion for a *Byrd* severance; (5) the district court improperly allowed the trial to proceed during his absence; and (6) the district court improperly ordered separate convictions and sentences for the conspiracy and continuing criminal enterprise counts.

ISSUES

The issues presented are: (1) whether the district court abused its discretion in investigating the alleged incidents of juror misconduct; (2) whether sufficient evidence supports the convictions; (3) whether the district court erred in denying Martin's motion for severance; (4) whether the district court erred in admitting declarations of co-conspirators; (5) whether the district court properly instructed the jury on the continuing criminal enterprise charge; (6) whether the district court erred in excluding impeachment testimony; (7) whether the district court properly answered the jury's question regarding FBI reports; and (8) whether the district court erred in denying Cardilli's motion for a *Byrd* severance.

DISCUSSION

I. *Juror Misconduct*

The district court has broad discretion in choosing the investigative procedure to be used in checking for juror misconduct and only abuse of that discretion will constitute error. *United States v. Caldwell*, 776 F.2d 989, 997 (11th Cir. 1985). Juror misconduct concerning outside influences must be fully investigated to determine if any misconduct actually occurred and whether or not it was prejudicial. *United States v. Brantley*, 733 F.2d 1429, 1439 (11th Cir. 1984), *cert. denied*, 470 U.S. 1006, 105 S.Ct. 1362, 84 L.Ed.2d 383 (1985). Failure to hold a hearing in these cases constitutes an abuse of discretion and is thus reversible error. *United States v. Chiantese*, 582 F.2d 974, 979 (5th Cir. 1978), *cert. denied*, 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 395 (1979).[1]

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), the court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

When, however, the alleged juror misconduct is based on statements jurors made which were not caused by media publicity or other outside influences, the court may use its discretion in deciding whether to interrogate the jurors. *Grooms v. Wainwright*, 610 F.2d 344, 347-48 (5th Cir.), *cert. denied*, 445 U.S. 953, 100 S.Ct. [734] 1605, 63 L.Ed. 2d 789 (1980). In *United States v. Caldwell*, 776 F.2d 989, 998 (11th Cir. 1985), the court found that "[t]he more speculative or unsubstantiated the allegation of misconduct, the less the burden to investigate." On the other hand, "[t]he more serious the potential jury contamination, especially where alleged extrinsic influence is involved, the heavier the burden to investigate." *Caldwell*, 776 at 998.

A. The First Remark

This case requires us to examine two alleged incidents of juror misconduct. The meaning of the first remark—"these guys sitting across from us think they're going to get off on this"—is ambiguous. Although the district court believed that a literal reading of the comment might not indicate prejudice, the district court stated that "the most logical interpretation of it" was that it conveyed "some conclusion adverse to the defendants."

We believe that this general ambiguous observation by one juror of the appellants' demeanor does not suggest serious jury contamination. Furthermore, the district court's limited hearing on the matter was appropriate because additional investigation might have over-emphasized the remark. *See Chiantese*, 582 F.2d at 980 ("the court must balance the probable harm resulting from the emphasis such action would place upon the misconduct and the disruption involved in conducting a hearing against

the likely extent and gravity of the prejudice generated by that misconduct."). In deciding not to interview the jurors, the district court found that "examination of the two jurors would only aggravate the situation, and after we talk to them about it, I think we wouldn't have any alternative but to excuse them, or declare [a] mistrial." The district court cured any possible taint by questioning the jurors on their ability to remain impartial and giving them an admonition to keep an open mind. No juror indicated an inability to remain impartial. We hold, therefore, that the district court did not abuse its discretion in refusing to further investigate the first alleged remark indicating juror misconduct.

B. The Second Remark

One juror allegedly made the second remark while in the jury box. Although the government argues that the statement—"do it to him good"—was never made, in the absence of a hearing by the district court, we must assume that it was made. *See Chiantese*, 582 F.2d at 980. The district court refused to investigate this remark because it observed that after several weeks of trial the jurors would naturally begin to form an opinion of the case. In *Grooms v. Wainwright*, the court found no abuse of discretion in the trial court's denial of a motion for a new trial where a juror remarked that "as far as I'm concerned, [from] what I heard already he's guilty." The court reasoned that the comment made at the end of the prosecution's case, did not reflect serious prejudice, "but only an objective evaluation of the evidence presented to date in the trial." *Grooms*, 610 F.2d at 348.

We also consider the meaning of this second statement to be ambiguous. Although defense counsel contends that

the juror who made the statement was looking at the DEA agent when he spoke those words, nothing suggests the identity of "him." Because the trial court is better able to judge the mood at trial and the predilections of the jury, we defer to the district court's conclusion that this statement did not reflect serious juror contamination. The district court properly exercised its discretion in deciding that the remark, made in the third week of trial, did not justify a potentially disruptive investigation.

II. *Sufficiency of the Evidence*

To determine whether sufficient evidence supports the convictions, we review the evidence in the light most favorable to the government and consider whether it proves the appellants' guilt beyond a reasonable doubt. The evidence need not be wholly inconsistent with every reasonable hypothesis except that of guilt. *United States v. Sanchez*, 722 F.2d 1501, 1505 [735] (11th Cir. 1984), *cert. denied*, 467 U.S. 1208, 104 S.Ct. 2396, 81 L.Ed.2d 353 (1984).

A. Harris

Harris argues that his conviction must be reversed because he presented alibi testimony concerning delivery of drugs to the Lakeland ranch in June 1986. The evidence shows however, that Harris had meetings and discussions with Coley about flying as a co-pilot on flights to Columbia and that he actually flew as co-pilot on two occasions. Even if a defendant presents alibi testimony, the jury is free to disbelieve the evidence and reject the defense. *United States v. Cotton*, 770 F.2d 940, 945 (11th Cir. 1985). We hold that ample evidence supports Harris's convictions of conspiracy and importation of cocaine and marijuana.

B. Frink

Frink contends that he could not be convicted on the testimony of four co-conspirators, particularly when two of them were unable to identify him. One co-conspirator, Coley, testified to meeting with Frink in November 1983 to discuss flying the scout plane. Bahmann, another co-conspirator, testified that he spoke with Frink while Frink was flying the scout plane. The jury had the right to credit this testimony. Consequently, we hold that sufficient evidence supports Frink's convictions for conspiracy and importation of cocaine.

C. Bucchiere

Bucchiere contends that the government did not present direct or circumstantial evidence to demonstrate that he participated in the drug conspiracy. Frank Bahmann testified that he saw Bucchiere with Cardilli and three others in a bar in Nassau, Bahamas. At that time, Daniel Sims told Bahmann that "they" had unloaded some marijuana, but did not identify who he referred to as "they." The evidence did not show that Bucchiere heard Sims's remarks or assented to them.

In the light most favorable to the government, Bahmann's testimony placed Bucchiere in the presence of members of the conspiracy, but it did not connect him to activities or physical acts necessary to support a conviction for importation of marijuana. *See United States v. Sarro*, 742 F.2d 1286, 1298 (11th Cir. 1984) (close association with conspirators is insufficient evidence of knowing participation in the crime). The prosecutor asked Bahmann whether he had seen Bucchiere on the subsequent trips to transfer the marijuana to the United States. Bahmann responded "yes, he was there to the best of my

recollection." The testimony does not identify whether "there" referred to the bar where Bahmann had seen him in the presence of Daniel Sims or whether it referred to the boats transporting the marijuana to the United States. Because the testimony failed to adequately identify any activities by Bucchiere with the actual importation of marijuana, we hold that the evidence is insufficient to prove his guilt beyond a reasonable doubt.

D. Cardilli

Cardilli contends that the government failed to prove that he managed at least five co-conspirators as required under the continuing criminal enterprise charge, 21 U.S.C. § 848(c)(2)(A). The government had to prove that five or more persons, identified prior to trial, acted in concert with Cardilli in his alleged "boat operation" and that he organized, supervised, or managed them. To prove that Cardilli engaged in a continuing criminal enterprise, the government had to prove that (1) Cardilli committed a felony violation of the Federal laws, (2) which was part of a continuing series of such violations, (3) which were undertaken in concert with five or more persons, (4) with respect to whom Cardilli occupied a position of organizer or supervisor or any other position of management, and (5) from which he derived substantial income or resources. *United States v. Boldin*, 818 F.2d 771, 774 (11th Cir. 1987). Cardilli challenges the third and fourth elements necessary to prove the offense, arguing that the government only proved that he conspired with and managed three other boat crewmen.

[736] The government presented extensive evidence on Cardilli's key role in organizing and coordinating the pick-up and transportation of drugs by boat. Cardilli concedes

that the evidence demonstrated that Daniel Sims, William Cossin, and Vince were boat crewmen. Cardilli argues that Nancy Sims may have been only an innocent bystander and the fact that she pleaded guilty to conspiring with Cardilli and all the others to travel in interstate and foreign commerce to import drugs does not prove Cardilli managed her. We agree, but we further note that by his admission on February 2, 1985, in a videotaped conversation, Cardilli stated that he had reduced his crew down to a fifth of what it had been. If the jury believed this evidence, as it had a right to do, five or more persons were managed by Cardilli. Therefore, sufficient evidence supports Cardilli's conviction for continuing criminal enterprise, and we so hold.

E. Haim

Haim contends that the evidence is insufficient to support his convictions on one count of importing cocaine and one count of importing marijuana. In support of this contention, Haim points to the alibi testimony he presented, confusion in the testimony concerning the dates charged in the indictment, and the questionable nature of Joyce Coley's identification. Fellow conspirators testified, however, that on three occasions in 1984, Haim retrieved cocaine dropped from the Piper Navajo and stored it on board a boat Haim operated. Frank Bahmann testified that Haim captained a boat bringing a load of marijuana into the United States. As noted above, the jury was free to disbelieve his alibi testimony. Furthermore, any confusion concerning dates or identification involved issues of credibility resolved by the jury. *United States v. Sarro*, 742 F.2d at 1295. Therefore, we hold that adequate evidence supports Haim's conviction for importation of cocaine and marijuana.

F. Martin

Martin contends that the government failed to present sufficient evidence to support his convictions for conspiracy and importation of cocaine. The evidence revealed that Martin operated a radio within two miles of the Lakeland ranch and gave signals to clear the Piper Navajo for landing. Martin's participation in radio surveillance of law enforcement communications belies his claim of mere presence. Thus, we hold that adequate evidence supports Martin's conviction for conspiracy and importation of cocaine.

III. *Martin's Severance Motion*

Martin contends that the district court erred in denying his motion for severance because out of the seventy-four overt acts listed in the conspiracy, he is named in only one. The testimony implicating Martin lasted no more than one hour out of a trial that took more than four weeks. Furthermore, none of the physical evidence introduced, including a videotape, implicated Martin. Martin argues that a separate trial would have taken less than one day and therefore would not have been burdensome to the courts. *See United States v. Mardian*, 546 F.2d 973, 980-81 (D.C. Cir. 1976) (failure to sever reversible error where trial counsel became unavailable due to illness, prosecution did not oppose severance, and separate trial would be brief with few witnesses).

To determine whether the district court abused its discretion in refusing to sever, the interest of judicial economy and a policy of favoring joint trials in conspiracy cases must be weighed against Martin's allegations of prejudice. *See United States v. Mota*, 598 F.2d 995, 1000 (5th Cir. 1979). Some degree of prejudice is inherent in every joint trial, but "only in the event such prejudice appears to

be compelling does severance become warranted." *United States v. Roper*, 874 F.2d 782, 789 (11th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 189, 107 L.Ed.2d 144 (1989) (quoting *United States v. Perez*, 489 F.2d 51, 65 (5th Cir. 1973), *cert. denied*, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974)). To assess the presence of compelling prejudice, we look to all the circumstances of the particular case to determine whether the [737] court's instructions sufficiently enabled the jurors to keep separate the evidence as relevant to each defendant. *United States v. Roper*, 874 F.2d at 789. Denial of a severance motion is reviewable only for an abuse of discretion. *United States v. Broadwell*, 870 F.2d 594, 605 (11th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 125, 107 L.Ed.2d 85 (1989).

We hold that the district court's denial of Martin's motion to sever is not an abuse of discretion. Martin cannot demonstrate the degree of compelling prejudice required to outweigh the interests of judicial economy in the trial of a complex conspiracy case. *See United States v. Dorsey*, 819 F.2d 1055, 1058 (11th Cir. 1987), *cert. denied*, 486 U.S. 1025, 108 S.Ct. 2022, 100 L.Ed.2d 233 (1988).

IV. *Declarations of Co-Conspirators*

Harris contends that the district court should not have admitted Frank Bahmann's testimony to the effect that a day after a cocaine air drop into Bahamian waters, Munday told Bahmann that Munday had retrieved the cocaine from the water and had off-loaded it to "Bert" [Harris]. We reject Harris's contention that this statement was a "reminiscence" and not in furtherance of the conspiracy. *See United States v. Phillips*, 664 F.2d 971 (5th Cir. Unit B 1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982) ("retrospective statement" to co-con-

spirator inadmissible because not in furtherance of the conspiracy).[2]

The declaration of a conspirator which provides information to his co-conspirators in order to keep them abreast of the conspiracy's current status is admissible. *United States v. Pool*, 660 F.2d 547, 562 (5th Cir. Unit B 1981). We review whether a conversation was "in furtherance of a conspiracy" under the clearly erroneous standard. *United States v. Posner*, 764 F.2d 1535, 1537 (11th Cir. 1985). We conclude that the district court properly admitted this testimony. Munday's declaration to Bahmann advised Bahmann of the location and manner in which the transfer of cocaine had been made, as well as the identity of the recipient. *See United States v. Caraza*, 843 F.2d 432, 436 (11th Cir. 1988) (statement regarding third member of the conspiracy held to be in furtherance of the conspiracy).

V. *Continuing Criminal Enterprise Instructions*

Cardilli contends that the district court's instructions on the continuing criminal enterprise charge were improper because the instructions allowed the jury to convict based on an aiding and abetting theory. *See United States v. Benevento*, 836 F.2d 60 (2d Cir. 1987), *cert. denied*, 486 U.S. 1043, 108 S.Ct. 2035, 100 L.Ed.2d 620 (1988) (error to instruct the jury that it could convict under continuing criminal enterprise if defendant aided and abetted another in operating a continuing criminal enterprise). According to Cardilli, the jury could have con-

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[2] In *Stein v. Reynolds Securities*, 667 F.2d 33, 34 (11th Cir. 1982), this court adopted as binding precedent all of the decisions of Unit B of the former Fifth Circuit.

sidered a tape recording between Cardilli and an informant, Cary Cole, as evidence not of the commission of the predicate offenses underlying the continuing criminal enterprise charge, but of his aiding and abetting Munday and Coley in *their* supervision of five or more persons.

The district court gave the Eleventh Circuit pattern instruction for the continuing criminal enterprise charge. Cardilli made no objection to the instruction. It is defense counsel's duty to identify erroneous language in a jury instruction. *United States v. Graziano*, 710 F.2d 691, 696 (11th Cir. 1983). Absent an objection by Cardilli, this court's inquiry on appeal concerns only whether the instruction constitutes an error. *United States v. Graziano*, 710 F.2d at 697. We hold that the district court's instruction to the jury was not erroneous.

VI. *Impeachment Testimony*

Cardilli also contends that the district court's refusal to either subpoena Cole or permit Cardilli to impeach Cole's credibility violated Cardilli's constitutional right [738] to confrontation, compulsory process, and due process. The district court ruled that Cole's credibility was not at issue and declined to admit the proffered testimony of five Louisiana police officers whose experience with Cole demonstrated his unreliability, according to Cardilli. The jury heard Cole's voice recorded on the tapes, but the government did not call him as a witness although he was on their pretrial witness list.

The evidence against Cardilli, however, came not from Cole, but from Cardilli's fellow co-conspirators, from Cardilli's own admissions on the videotape, and from statements Cardilli made to an undercover agent. Because Cole never testified, the district court properly exercised its

broad discretion by not allowing Cole's credibility to become an issue. *See United States v. Solomon*, 686 F.2d 863, 874 (11th Cir. 1982) (district court has broad discretion in ruling on the admissibility of character testimony).

VII. *Jury Question About FBI Reports*

The FBI produced reports concerning its debriefing of Coley following his arrest. These reports were used extensively by defense counsel to refresh Coley's recollection during cross-examination and by the prosecutor on redirect. The court gave the following instruction in response to the jury's question about whether the reports would be made available to the jury:

> Ladies and gentlemen, about these reports, these FBI reports which have been used by counsel in examining this witness, and others, these are not verbatim statements of the persons being interviewed. They are on the other hand reports of trained investigators which generally speaking reflect the perception of the agent as to what the person being interviewed said. This kind of report may be used to refresh a person's recollection, and such reports may be helpful in that way, but they should not be considered by you as inconsistent because they are not truly statements of the person being interviewed. They are only the interviewer's perception of the information available through the interviewee. . . . I must inform you that these reports will not be available to you as part of the evidence in the case, but have some utility, and they have been given that utility, but they are not going to be available as part of the evidence in the case.

Cardilli contends that under rule 612 of the Federal Rules of Evidence, any "writing" used to refresh a witness's recollection may be introduced into evidence by the ad-

verse party. *See United States v. Nobles*, 422 U.S. 225, 232 n. 6, 95 S.Ct. 2160, 2167 n. 6, 45 L.Ed.2d 141 (1975). Cardilli also contends that rule 613 of the Federal Rules of Evidence allows him to impeach the credibility of witnesses by examination concerning prior inconsistent statements and by introducing extrinsic evidence of such statements.

In determining whether the district court properly responded to a jury request, we consider whether the instructions as a whole fairly and correctly stated the applicable issues of law. *United States v. Russell*, 717 F.2d 518, 521 (11th Cir. 1983). We hold that the district court's instructions regarding credibility and impeachment, taken as a whole, fairly and correctly stated the applicable law.

VIII. *Cardilli's Motion for a Byrd Severance*

Prior to trial, Cardilli moved for severance and proffered the affidavits of five co-defendants. The affidavits stated that if Cardilli called each affiant to testify at a joint trial, each would invoke the fifth amendment; however, if called as witnesses at a separate trial, they would testify that Cardilli did not supervise them, pay for their services, or derive substantial income from such services. The magistrate ruled that the statements and the affidavits were irrelevant because the co-defendants were unwilling to make statements against their own penal interests. The magistrate found that, as a matter of law, an affidavit of a co-defendant stating that the defendant did not commit the crime could not be [739] sufficient to warrant a severance unless the co-defendant also alleged *who* actually committed the crime. The district court denied the motion.

Cardilli argues that the co-defendants could deny that he was a manager or supervisor for purposes of the con-

tinuing criminal enterprise count without incriminating another person. For example, Cardilli argues, an alleged crew person could have been on board one of the boats at the time the narcotics were retrieved, but merely as an innocent bystander. Therefore, they could only testify that no one supervised them in a criminal activity.

To be entitled to severance, a defendant arguing that he needs a co-defendant's testimony must demonstrate (1) a bona fide need for the testimony, (2) the substance of the testimony, (3) its exculpatory nature, and (4) that a co-defendant would in fact testify if the cases were in fact severed. *Byrd v. Wainwright*, 428 F.2d 1017 (5th Cir. 1970). Denial of a motion to sever is within the broad discretion of the district court. *United States v. Machado*, 804 F.2d 1537, 1544 (11th Cir. 1986). To show that the district court abused its discretion, Cardilli must demonstrate that he suffered compelling prejudice as a result of the court's refusal to grant the severance. *See United States v. Pruitt*, 763 F.2d 1256, 1263 (11th Cir. 1985), *cert. denied*, 474 U.S. 1084, 106 S.Ct. 856, 88 L.Ed.2d 896 (1986).

In *United States v. DeSimone*, 660 F.2d 532 (5th Cir. 1981), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1732, 72 L. Ed.2d 149 (1982), the defendant similarly attempted to satisfy the criteria for severance set out in *Byrd* through an affidavit. In *DeSimone*, the court said that even if the defendant makes a facial showing comporting with *Byrd*, "the district court must then (1) examine the significance of the testimony in relation to the defendant's theory of defense, (2) assess the extent of prejudice caused by the absence of the testimony, (3) pay close attention to judicial administration and economy, and (4) give weight to the timeliness of the motion." *DeSimone*, 660 F.2d at 540. In *DeSimone*, the court found that the affidavit did not con-

tain specific exonerative facts to which the co-defendant would testify if severed. The court also found the affidavit lacked credibility because it did not contravene the co-defendant's own penal interest. "Under these circumstances, we believe that any prejudice occasioned by the absence of Butler's testimony was outweighed by judicial economy considerations inherent in this complex conspiracy." *DeSimone*, 660 F.2d at 540.

As in *DeSimone*, the affidavits in this case contain only conclusory assertions that the affiants did not conspire with Cardilli nor he with them. The affidavits do not attest that the co-defendants were merely innocent bystanders as suggested by Cardilli, but if they did, such assertion would be self-serving and would undermine the credibility of the affidavits. Under these circumstances we hold that any prejudice resulting from the exclusion of their testimony was outweighed by considerations of judicial economy inherent in a complex conspiracy case. *See also United States v. Pepe*, 747 F.2d 632, 651 (11th Cir. 1984) (denial of *Byrd* severance affirmed where proffered testimony conclusory and not against penal interest).

IX. *Cardilli's Absence From Trial*

Cardilli contends that the district court erred by proceeding with the trial during his involuntary absence. During closing arguments by the defense, Cardilli became ill. As a result, he was absent during co-defendant's summation, the prosecutor's rebuttal summation, and the court's charge to the jury.

Cardilli's counsel waived any prejudice resulting from his absence by failing to object to proceeding with the trial in his absence. *See United States v. Jones*, 527 F.2d 817, 830 (D.C. Cir. 1975) (prejudice due to absence waived

by failure to object). During Cardilli's absence, Cardilli's counsel continued to vigorously represent Cardilli's interests. This court has found that a defendant's short absence during his trial is not significant when his attorneys are present at all times. *Finney v. Zant*, 709 [740] F.2d 643, 646 (11th Cir. 1983), *overruled on other grounds, Peek v. Kemp*, 784 F.2d 1479 (11th Cir.), *cert. denied*, 479 U.S. 939, 107 S.Ct. 421, 93 L.Ed.2d 371 (1986).

X. *Separate Convictions and Sentences for Conspiracy and Continuing Criminal Enterprise*

The government concedes that the conspiracy and continuing criminal enterprise charges against Cardilli merge because the conspiracy to import narcotics charge is the lesser included offense of continuing criminal enterprise. *United States v. Michel*, 588 F.2d 986, 1001 (5th Cir.), *cert. denied*, 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979). Because the charges are merged, we vacate the conviction and sentence of the lesser included offense of conspiracy.

CONCLUSION

In summation, we reverse Bucchiere's conviction for insufficient evidence and vacate Cardilli's conviction and sentence for conspiracy. On all remaining issues, we affirm.

REVERSED in part, VACATED in part, and AFFIRMED.

ANDERSON, Circuit Judge, concurring in part and dissenting in part:

I concur in all of the opinion for the court, except with respect to the juror misconduct issue. I disagree with the majority's conclusion that the two remarks are ambiguous.

With respect to the first remark—"these guys sitting across from us think they're going to get off on this"—I agree with the district court that "the most logical interpretation of it" was that it conveyed "some conclusion adverse to the defendants." I conclude that this remark reflects a premature opinion on the part of the juror, voiced on the second day of a four-week trial.

Nor can I conclude that the second remark is ambiguous. The remark was made by one of the two jurors involved in the first remark. The remark was made from the jury box when a DEA agent was about to testify. Under these circumstances, it seems clear to me that the remark—"do it to him good"—unambiguously indicates a premature opinion on the part of the juror. Moreover, the tenor of the remark indicates that the premature opinion was held with considerable intensity, increasing the difficulty that the juror could set aside the opinion and rely solely on the evidence.

In cases of "speculative or unsubstantiated allegation[s] of misconduct" (majority at 734), the obligation of the district court to investigate is light; however, I cannot conclude that this is such a case. Rather, I conclude that the remarks in this case represent a serious indication of jury contamination, and thus triggered a heavier burden on the part of the district court to investigate. With respect to this issue, I respectfully dissent.

APPENDIX 2

[FILED NOVEMBER 13, 1990]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-6212

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LLOYD FRINK,
PHILIP CARDILLI,
JESUS HAIM,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING
AND SUGGESTION(S)
OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19____, ____ F.2d ____).

Before: HATCHETT and ANDERSON, Circuit Judges,
and DYER, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/90)

APPENDIX 3

Supreme Court of the United States

No. A-552

Philip Cardilli,

Petitioner

v.

United States

ORDER

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including April 1, 1991.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme
Court of the United States

Dated this 22nd
day of January, 1991.